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No. 07-1209

In The
Supreme Court of the United States

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS,

Petitioner,

v.

WOODROW F. SANDERS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

RESPONDENT'S BRIEF FOR WOODROW F. SANDERS

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QUESTION PRESENTED

Whether, at the Court of Appeals for Veterans Claims, claimants seeking disability benefits in the uniquely paternalistic Veterans Benefits Adjudication System should bear the burden of persuasion to establish the prejudicial effect of a notice error required by 38 U.S.C. § 5103(a).

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STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are: 5 U.S.C. § 706; 28 U.S.C. § 391 (1919); 38 U.S.C. § 5103(a); 38 U.S.C. § 7252(b) and 38 U.S.C. § 7261(a), (b). *See* Respondent App., *infra*, 1 (setting forth the entire text of 28 U.S.C. § 391 (1919) and 38 U.S.C. § 7252(b)).

STATEMENT

1. The Veterans Benefits Adjudication System divides into two basic functions: the development and adjudication[1] of claims. Under its inquisitorial model, the Department of Veterans Affairs ("the VA", "the Agency" or "the Secretary") has a duty to develop the record for claimants: namely, the duty to retrieve and produce relevant evidence. H.R. REP. NO. 100-963, at 13, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795 ("I[m]plicit in such a beneficial system has been an evolution of a completely ex parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits."); *Littke v.*

[1] VA adjudication takes place on two levels: the first occurs at one of the many local regional offices, and if dissatisfied with the regional office decision, the claimant may appeal to the United States Board of Veterans' Appeals for a decision. *See Jaquay v. Principi*, 304 F.3d 1276, 1280-82 (Fed. Cir. 2002) (en banc) (providing overview of the various stages of VA adjudication).

Derwinski, 1 Vet. App. 90, 91 (1990) ("The VA takes pride in operating a system of processing and adjudicating claims for benefits that is both informal and nonadversarial. An integral part of this system is embodied in the VA's duty to assist the veteran in developing the facts pertinent to his or her claim.").

To improve the development process, Congress enacted a comprehensive statutory scheme in November of 2000, known as the Veterans Claims Assistance Act (VCAA). Pub.L. No. 106-475, § 3, 114 Stat. 2096 (codified at 38 U.S.C. §§ 5100-5107 (2000)). Section 3(a) of the VCAA, which amended 38 U.S.C. § 5103(a), provides:

> Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary . . . will attempt to obtain on behalf of the claimant.

The VCAA notice regime turned record development into a more collaborative process, inspiring claimants to be active partners with the VA in evidence collection and production. *Locklear v. Nicholson*, 20 Vet. App. 410, 414 (2006) ("the duty to notify was designed by Congress with one purpose in mind –

to facilitate and maximize the collaborative process that is the cornerstone of the VA claims process"); Barton F. Stichman & Ronald B. Abrams, eds., *Veterans Benefits Manual* § 16.6.6.1, at 1337 (2006 ed.) ("The duty to notify provided for in the amended 38 U.S.C. § 5103(a) may be the most significant change in law to come about since the Veterans Judicial Review Act was passed in 1988 . . . ").

Prior to the enactment of the VCAA, claimants were permitted, but not systematically advised, to participate in evidentiary development. Former § 5103(a), for example, only obligated the VA to inform claimants to secure evidence in very limited situations. *McKnight v. Gober*, 131 F.3d 1483, 1485 (Fed. Cir. 1997) (holding that once the VA is put on notice of specific relevant evidence, the VA has a duty to inform the veteran to obtain this evidence).

The VCAA, on the other hand, mandates a litany of notifications for virtually every type of disability claim.[2] Section 5103(a), with its complementary regulation, 38 C.F.R. § 3.159(b)(1), breaks down into four parts (referred to as notice elements 1-4):

> (1) notice of what information or evidence is necessary to substantiate the claim; (2) notice of what subset of the necessary"

[2] *See Livesay v. Principi*, 15 Vet. App. 165, 178-79 (2001) (holding that provisions of VCAA do not apply to claims seeking a revision of a final Agency determination pursuant to 38 U.S.C. §§ 5109A and 7111).

> information of information or evidence, if any, that the claimant is [obligated] to provide; (3) notice of what subset of the necessary information or evidence, if any, that the VA will attempt to obtain; and (4) a general notification that the claimant may submit any other evidence he or she has in his or her possession that may be relevant to the claim.

(App.[3] at 9a.)

By this notice scheme, the Agency educates disabled veterans on what is needed to prevail in their claims, and prompts them to procure *existing* evidence and to produce *new* evidence, if necessary, to substantiate their claims.

> It is undisputed that section 5103(a) was enacted to in order that VA would "early in the claim process" let VA claimants know "what was necessary to substantiate their claims", (citations omitted), "so that the claimant[s] and/or VA can produce" the "information needed to substantiate their claims" that is "missing". . . . In this manner, section 5103(a) assumes a fundamental role in furthering an interest that goes to the very essence of the non-adversarial, pro-claimant nature of the VA adjudication system, . . . – that is, VA's duty to assist claimants in the development of their claims – by affording a claimant a meaningful opportunity to participate

[3] "App." refers to the Appendix attached to the Petitioner's petition for a writ of certiorari.

> effectively in the processing of his or her claim. (internal citations omitted).

Mayfield v. Nicholson ("*Mayfield I*"), 19 Vet. App. 103, 120-21 (2005), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006).

2. Respondent Woodrow F. Sanders, a veteran of World War II, served in the U.S. Army from May 1942 to September 1945. (App. at 25a.) He reports that in September 1944, while fighting the enemy in Germany, a bazooka exploded on the right side of his face, burning his eyebrows and facial hair. (*Id*. at 25a-26a.) Respondent claims that, six months after discharge, he began losing his sight in the right eye. (*Id*. at 45a.)

In December of 1948, Respondent was hospitalized for treatment and examination of his right eye. The admission examination report indicated that Respondent had severe macular chorioretinitis[4] of the right eye, with blindness in the central visual field. The hospital's final diagnosis was chronic right choroidoretinis (hereafter "chorioretinitis"), cause undetermined. (*Id*. at 44a-45a.)

In December 1992, VA physician, Joseph Ruda, M.D., Chief of Ophthalmology, prepared a written opinion on Respondent's behalf. After examining

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[4] *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 324 (28th ed. 1994) (defines chorioretinitus as an inflation of the choroid and retina).

Respondent and taking the history of the in-service explosion into account, Dr. Ruda opined:

> It is not inconceivable that these macular and retinal lesions in each fundi and particular the right could have occurred secondary to trauma.

(*Id*. at 26a.)

In September 1993, private ophthalmologist Gregory A. Strainer, M.D., prepared a written opinion. Dr. Strainer concluded:

> This type of macular injury in [Respondent's] right eye can certainly be concussive in character and his history supports the visual acuity loss from his injury in World War II.

(*Id.* at 27a.)

In December 2000, Respondent underwent a VA eye examination by Sheila F. Anderson, M.D., Chief of Optometry. Dr. Anderson found it difficult to offer an etiological opinion based upon the available medical records:

> It is certainly possible for there to have been damage to the retina in 1944 that then hemorrhaged in 1948, as hemorrhages were noticed at that visit, but there are no other signs of ocular trauma. The chorioretinitis is most likely infections in nature, although the etiology at this point is impossible to determine. It is also possible that the patient contracted some infection while

> in the service that caused the chorioretinitis, but there is no way to prove this either. Based on the documented records, the patient did not lose vision *while*[5] on active duty.

(*Id.* at 29a) (italics added).

In August 2001, Respondent underwent another VA eye examination. Ophthalmologist Duane Y. Nii, M.D. could only surmise on the cause of his right eye condition:

> [Respondent's] decreased vision in the right eye is consistent with his clinical findings. The etiology of the patient's macular scar is more difficult to ascertain. If the patient's vision had been normal in the right eye prior to the reported injury, then it is possible that the macular scar could be related to the

[5] A claim for service-connected disability benefits may be granted on either a causal or temporal theory of service-connection. 38 C.F.R. § 3.303(a), (d). Most claims are based upon a causal theory of service-connection, requiring proof of three elements: 1) an in-service incurrence of an original disability or in-service aggravation of pre-existing (pre-service) disability, 2) a present disability, and 3) a relationship or nexus between present disability and the alleged in-service incurrence or aggravation. *See Pond v. West*, 12 Vet. App. 341, 346 (1999). For certain listed diseases meeting specified criteria, the VA presumes a nexus between present disability and service. *See Veterans Benefits Manuals*, § 3.4.5 at 115-27. For claims predicated on a theory of temporal service connection, the claimant must show: 1) initial manifestation of symptoms of the disease or condition in service and, 2) present disability of the same disease or condition. *See VA Gen. Couns., Prec. 82-90* (July 18, 1990) (originally issued as *VA Gen. Couns., Prec. 1-85* (Mar. 5, 1985)).

> injury as [Respondent] states. Due to the fact that [Respondent] does have the additional punched out chorioretinal scars in both eyes, the possibility of toxoplasmosis as the etiology of the macular scar could also be entertained.

(*Id*. at 30a.)

3. Following its denial of Respondent's claim to service-connected chorioretinitis of the right eye, the local Regional Office sent a letter to Respondent on June 18, 2003. (JA[6] at 24-29.) Among other things, the correspondence advised Respondent of the general type of evidence needed to substantiate a claim for service-connected disability benefits. (*Id.* at 27-28.)

4. On October 1, 2003, the United States Board of Veterans' Appeals ("the Board") denied Respondent's claim to entitlement to service connection for chorioretinitis of the right eye. (App. at 42a.)

5. On August 25, 2005, the United States Court of Appeals for Veterans Claims ("the Veterans Court") affirmed the Board's denial of the right eye claim. There, Respondent argued that the VCAA notice was defective on two grounds: 1) the correspondence failed to advise Respondent who would be ultimately responsible for obtaining evidence necessary to substantiate his claim and, 2) the notice was untimely,

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[6] "JA" denotes the Joint Appendix.

having been provided after the initial Regional Office decision. (*Id.* at 38a); *see Mayfield I*, 19 Vet. App. at 128.

Assuming notice violations under § 5103(a), the court held that Respondent failed to meet his burden of establishing prejudice under the framework of *Mayfield I*, 19 Vet. App. 103.[7] (App. at 37a-38a.)

6. On May 16, 2007, the United States Court of Appeals for the Federal Circuit ("the Federal Circuit") reversed and remanded the decision of the Veterans Court. The Federal Circuit observed that "[t]he requirement that a claimant demonstrate prejudice as a result of a VCAA notice error is at odds with the very purpose behind the passage of the VCAA." (*Id.* at 14a.) Overruling *Mayfield I*, *id*., in part, the court reasoned that, with respect to all types of notice errors, placing the burden on claimants would effectively excuse the VA of its VCAA notice obligations:

> By presuming these notice errors were not prejudicial, the Veterans Court essentially excused the VA's failure to satisfy its statutory obligations – ones which Congress explicitly required in order to allow the claimant to effectively participate in the processing of his or her claim – without a

[7] *Mayfield I* held that claimants must bear the burden of establishing prejudice of VCAA notice violations, except for notice-1 errors. 19 Vet. App. at 122: *see supra* pp. 3-4.

> showing that the defect had not frustrated the very purpose of the notice.

(*Id.* at 18a.)

SUMMARY OF ARGUMENT

I. The two harmless error statutes in question, 5 U.S.C. § 706 of the Administrative Procedure Act ("APA") and 38 U.S.C. § 7261(b)(2) of the Veterans Judicial Review Act ("VJRA"), are written in virtually identical language. As such, the two provisions have presumptively parallel meaning and application. *Northcross v. Bd. of Ed. of Memphis City Sch.*, 412 U.S. 427, 428 (1973); *see* Brief for the Petitioner ("BP") at 8-9.

Significantly, § 706, as does § 7261(b)(2), refers to a pre-existing rule of prejudicial error: "*the* rule of prejudicial error." (emphasis added); *accord* BP at 13. At the time of the APA's enactment in 1946, then-existing rule of prejudicial error was governed by 28 U.S.C. § 391 (1919) (currently 38 U.S.C. § 2111 (1949)). Before and after the passage of the APA, with one exception, this Court consistently interpreted § 391 as placing the burden of persuasion on the beneficiary of a nontechnical error (hereafter "the respondent[s]")[8] to establish the nonprejudicial effect of the

[8] In this context, the respondent will be written with the first letter being lower case. When referring to the party in this action, Respondent will be written with the first letter as upper case.

error. *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926); *McCandless v. United States*, 298 U.S. 342, 347-48 (1936); *Bihn v. United States*, 328 U.S. 633, 638 (1946); *Kotteakos v. United States*, 328 U.S. 750, 760 (1946); and *O'Neal v. McAninch*, 513 U.S. 432, 439 (1995).

For this and other reasons, §§ 706 and 7126(b)(2) must be read to cast the burden of persuasion on the respondent.

II. Moreover, even if the general rule of prejudicial error were otherwise, the *due account* clause of § 7261(b)(2) and the *sui generis* VCAA notice requirements would nonetheless compel the respondent to bear the burden of persuasion for VCAA notice violations. In light of what results from a notice violation – an undeveloped record on appeal – judicial review only makes sense if the respondent/Agency bears the burden of establishing the nonprejudicial effect of a VCAA notice error.

III. Notice under § 5103(a) is unquestionably a substantial right. Nevertheless, Petitioner contends that a violation of this right should not give rise to a presumption of prejudice. Speculating that other VA procedures *might* cure the prejudice resulting from a VCAA notice failure, Petitioner forebodes that a rule of presumptive prejudice would create insurmountable proof problems for the VA, leading to an avalanche of unwarranted remands. But this dim prediction is exaggerated. In fact, two published Veterans Court cases since the Federal Circuit's

opinion demonstrate that the VA can successfully rebut the presumption of prejudice in many appropriate circumstances.

What is more, unlike Petitioner's proposed rule of presumed harmlessness, the Federal Circuit's calculus has the virtue of deciding all questions on the administrative record. Consistent with the statutory ban against consideration of extra-record evidence, 38 U.S.C. § 7252(b); 38 U.S.C. § 7261(b), the rule of presumed prejudice renders unnecessary after-the-fact proffers, declarations or other testimonials never submitted to the Agency.

In sum, the Federal Circuit's decision is not only consistent with the letter and spirit of the VCAA, but also gives the proper respect owed to the men and women who have served our Nation's armed forces. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) ("This court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimants.") (internal citations omitted); *see generally Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990) ("This unique standard of proof is in keeping with the high esteem in which our nation holds those who have served in the Armed Service. . . . By tradition and by statute, the benefit of the doubt belongs to the veteran."). To the extent there is any doubt in the interpretation of § 7261(b)(2), "that interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (internal citation omitted).

ARGUMENT

I. THE RESPONDENT HAS THE BURDEN TO ESTABLISH THE NONPREJUDICIAL EFFECT OF A NONTECHNICAL ERROR

Petitioner argues that the language and legislative history of 38 U.S.C. § 7261(b)(2)[9] establish that "Congress intended to adopt the same rule of prejudicial error as that applied under the APA [5 U.S.C. § 706[10]]." BP at 11. This same rule of prejudicial error, Petitioner asserts, places the burden of persuasion on the party asserting the error (hereafter "the appellant[s]") to establish the prejudice of the error. BP at 15-17.

For this proposition, Petitioner relies upon the purported "uniform[11] view of the federal [circuit]

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[9] Under § 7261(b)(2), the Veterans Court "shall take due account of the rule of prejudicial error."

[10] Section 706 states "due account shall be taken of the rule of prejudicial error."

[11] Petitioner's characterization of the case law interpreting § 706 as "uniform" is inaccurate. On the burden of persuasion issue, the most analogous Supreme Court decision is *Mass. Trs. of E. Gas & Fuel Ass'ns v. United States*, 377 U.S. 235 (1964). There, in refusing to remand an agency determination, the Court broadly stated the test for harmless error:

> In light of these factors we find inapposite here cases refusing to validate an exercise of administrative discretion because it could have been supported by principles or facts not considered, or procedures not undertaken, by the responsible body. These cases are aimed at assuring that initial administrative determinations are made with relevant criteria in mind

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> and in a proper procedural manner; when a mistake of the administrative body is one that *clearly* had no bearing on the procedure used or the substance of decision reached, as in this instance (assuming there was such a mistake), the sought extension of the cases cited would not advance the purpose they were intended to serve.

Id. at 247-48 (emphasis added). By employing the word *clearly* in this context, the Court necessarily held that the respondent/beneficiary of the error would have the burden to persuade a reviewing court of the harmlessness of the error. For, if a court is uncertain on this question, the error must be deemed prejudicial. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995) ("We conclude that the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict"); *Jordan v. Medley*, 711 F.2d 211, 219 (D.C. Cir. 1983) (J. Scalia) (noting that reviewing court must have "necessary assurance" that error did not affect the verdict otherwise error is deemed prejudicial); *Kotteakos*, 328 U.S. at 765 ("fair assurance" standard); *see also Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1071 (9th Cir. 2004) ("In circumstances where an agency errs, we may evaluate whether such an error was harmless. *See* 5 U.S.C. § 706. In applying harmless error analysis, our precedent dictates that the agency must demonstrate that its error on the controlling regulation was harmless."); *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 807 (9th Cir. 2005) ("The Forest Service [Agency] bears the burden of demonstrating harmlessness. (Citation omitted)."); *U.S. Steel Corp. v. U.S. E.P.A.*, 595 F.2d 207, 215 (5th Cir. 1979) ("Nor can the Agency rest on the doctrine of harmless error. While that doctrine has been held applicable to review of agency actions, and has statutory sanction in the APA, it is to be used only 'when a mistake of the administrative body is one that *clearly* had no bearing on the procedure used or the substance of decision reached.' . . . Here the Agency's error plainly affected the procedure used, and we cannot assume that there was no prejudice to petitioners. *Absence of such prejudice must be clear for harmless error to be applicable*." (emphasis added); *Braniff*

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courts . . . that Section 706 'requires the party asserting error to demonstrate prejudice from the error.' (Citations omitted)." BP at 15.

Contrary to Petitioner's contention, 28 U.S.C. § 391 [current version at 38 U.S.C. § 2111] – the original federal harmless error statute – controls the interpretation of §§ 706 and 7261(b)(2). Both before and after the passage of the APA, with one exception, the High Court consistently read this harmless error statute as placing the burden of persuasion on the respondent to establish the nonprejudicial effect of a nontechnical error.

The APA was a groundbreaking experiment for its day, designed to bring uniformity to the many diverse federal agencies. *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999). Among the APA's several provisions, § 706 instructs that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. This stark command leaves the term prejudicial error undefined, and the legislative history, to the extent it is relevant, is scanty and inconclusive.[12] With no clear statutory

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Airways, Inc. v. C. A. B., 379 F.2d 453, 467 (D.C. Cir. 1967) (holding that in a "close case", Agency may not rely upon harmless error doctrine to affirm its decision).

[12] Some parts of the legislative history suggest Congress adopted the general common law of all state jurisdictions. S. REP. NO. 79-758, at 231 (1945); App. to Attorney General's Statement regarding Revised Committee Report of October 5, 1945, at 418. Other parts indicate that Congress intended the harmless error rule to apply when the error has been cured before the administrative decision. S. REP. NO. 79-758 (1945); H.R. REP. NO. 79-1980, at 280 (1946).

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directive, the most natural assumption is that Congress took the then-existing federal harmless error standard as its paradigm. *See Cornelius v. Nutt*, 472 U.S. 648, 657 n.9 (1985) (noting that Congress presumably intended the undefined term "harmful error" under 5 U.S.C. § 7701(c)(2)(A) to have its judicially-defined meaning); *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998) ("[Section 706] 'sums up in succinct fashion the 'harmless error' rule applied by courts in the review of lower court decisions as well as of administrative bodies,' . . . The rule tempers judicial consideration of challenges to 'preliminary, procedural, or intermediate agency action,' 5 U.S.C. § 704, in much the same way the harmless error rule affects appellate review of other types of cases.") (citing United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 110 (1947), *reprinted in* Administrative Conference of the United States Federal Administrative Procedure Sourcebook 67, 176 (2d ed. 1992); *Braniff Airways, Inc.*, 379 F.2d at 465 ("Although the standards governing its application may differ, the 'harmless error' principle announced for our general jurisprudence by decision and statute (*e.g.*, 28 U.S.C. § 2111 (1964)) is

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At the time of the passage of the APA, the prevailing rule of the common law in state jurisdictions was that errors were presumed prejudicial. 3 Am. Jur., "Appeal & Error," § 926 (1936) ("According to what seems to be the prevailing rule, the reviewing court will presume that such error was prejudicial unless the record shows the contrary.").

applicable to the review of the decisions of administrative agencies."); *Kerner v. Celebreeze*, 340 F.2d 736, 740 (2nd Cir. 1965) ("Although the harmless error statute, 28 U.S.C. § 2111, is not in terms applicable to review of administrative action, we perceive no reason why the salutary principle embodied in it should not be so applied, even when the error consists of a procedural irregularity under the APA as, indeed, § 10(e) of the APA contemplates."); (citation omitted); C. Robert Luthman, *Conway v. Principi, Mayfield v. Nicholson, and (Re?) Defining the Harmless Error Doctrine in Light of the Veterans Claims Assistance Act of 2000*, 16 Fed. Cir. B.J. 509, 515 (2007) ("While administrative law precedent does not flesh out the specific parameters of the harmless error doctrine, it is apparent that the doctrine, as it exists, draws on the harmless error rule in the civil and, to a certain extent, the criminal forums.").

Viewed from another perspective, just as the deliberate use of the article *the* in § 7261(b)(2) contemplates "a specific and previously defined rule for determining whether an error is prejudicial," BP at 13, so does the use of the same article in § 706. At the time of the APA's enactment in 1946, the only existing rule of prejudicial error was that governing criminal and civil appeals: 28 U.S.C. § 391 (1919) (current version at 38 U.S.C. § 2111 (1949)); *see also* Fed. R. Civ. P. 61 (1937); Fed. R. Civ. P. 51 (1937); Fed. R. Crim. P. 52(a) (1944). *See Dir., Office of Workers' Comp. Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 275 (1994) (interpreting undefined

term of the APA as following the definition generally accepted at the time of the enactment of the APA).

a) The Federal Common-Law Rule Of Harmless Error Cast The Burden Of Persuasion On Respondents

The rule of prejudicial error springs from the English common law. *Chapman v. Cal.,* 386 U.S. 18, 24 (1967) ("[T]he original common-law harmless-error rule put the burden [of persuasion] on the beneficiary of the error. . . ."; 1 Wigmore, Evidence 364 *et seq*. (3rd ed. 1940). American common law followed the English rule in both criminal and civil practice.

In *Deery v. Cray*, 72 U.S. 795 (1866), the Supreme Court announced what was to become the longstanding rule of harmless error review – that the respondent bears the burden of persuasion to establish the nonprejudicial effect of an error:

> We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But *whenever* the application of this rule is sought, *it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights*.

(*Id.* at 807-08) (emphasis added).

The rule of *Deery* governed the common law for fifty years; when in 1919, Congress took up the question of harmless error. *See, e.g., Crawford v. U.S.*, 212 U.S. 183, 203 (1909); *Peck v. Heurich*, 167 U.S. 624, 629 (1897); *Boston & A. R. Co. v. O'Reilly*, 158 U.S. 334, 337 (1895); *Mexia v. Oliver*, 148 U.S. 664, 673 (1893); *Vicksburg & M. R. Co. v. O'Brien*, 119 U.S. 99, 103 (1886); *Moores v. Citizens' National Bank*, 104 U.S. 625, 629-30 (1881); *Smiths v. Shoemaker*, 84 U.S. 630, 639 (1873); *see also Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919) ("[I]n jury trials erroneous rulings are *presumptively* injurious, . . . and they furnish ground for reversal unless it *affirmatively* appears that they were harmless." (emphasis added); *Yazoo & M.V.R. Co. v. Mullins,* 249 U.S. 531, 532-33 (1919) ("It is true generally in cases coming from lower federal courts that the rendering of an erroneous decision on a particular question, . . . or the assignment by the lower court of an erroneous reason for a right decision, will not entitle the complaining party to reversal, if it is *clear that his rights were not prejudiced thereby*," (emphasis added) (internal citations omitted).

b) With One Exception, The Original Harmless Error Statute Has Been Consistently Interpreted By This Court To Place The Burden Of Persuasion On Respondents

In 1919, Congress amended § 269 of the Judicial Code, 28 U.S.C. § 391 (repealed by the Judicial

Act of 1948), creating the original harmless error statute, and a template for other harmless error provisions.[13]

Section 391 read:

> All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons which new trials have usually been granted in courts of law. On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment *after an examination of the entire record* before the court, *without regard to technical errors, defects, or exceptions* which do not affect the substantial rights of the parties.[14]

(emphasis added).

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[13] Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded"); Fed. R. Civ. P. 61 ("[T]he court must disregard all errors and defects that do not affect any party's substantial rights."); Fed. R. Evid. 103(a) ("Error may not be predicated upon a ruling . . . unless a substantial right of the party is affected").

[14] In 1949, section 391 was replaced by 38 U.S.C. § 2111, with no substantive changes made. *Brecht v. Abrahamson*, 507 U.S. 619, 631 n.7 (1993). In § 2111, Congress omitted the word "technical" and the words "criminal or civil", thereby affirming that harmless error review extended to "any case."

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Congress wrote this provision against the well-established common-law rule that errors are presumptively prejudicial. As such, Congress is presumed to have endorsed this presumption. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles", and common-law principles are read into legislation unless they contradict the legislative intent.).

More importantly, in drafting this amendment, Congress had the opportunity to change the ending phrase from a negative to an affirmative requirement: errors "which do *not* affect substantial rights . . . " § 2111 (emphasis added). At the time of the passage of § 2111 in 1949, Congress had recently enacted Rules 52(a) and (b) of the Federal Rules of Criminal Procedure, the harmless and plain error review provisions. Significantly, Congress couched these two complementary sections in negative and affirmative terms, respectively. Fed. R. Crim. P. 52(a) (1944) ("does *not* affect substantial rights") (emphasis added); Fed. R. Crim. P. 52(b) ("that affects substantial rights"). This linguistic difference set forth reciprocal allocations of the burden of persuasion. *United States v. Olano*, 507 U.S. 725, 734-35 (1993) ("This burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error 'does *not* affect substantial rights.' Rule 52(b) authorizes no remedy unless the error *does* 'affect substantial rights.'" (emphasis added). Presumably cognizant of the differing language of Rule 52 and its import, Congress nonetheless declined to make any changes to the critical wording of § 2111: that is, to frame the ending clause in affirmative terms, thereby allocating the burden of persuasion to appellants. *See generally Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

Except for so-called *technical* errors, the common-law rule fit easily within the language and intent of § 391. *Kotteakos*, 328 U.S. at 760 ("[T]he bill in its final form was stated authoritatively to be 'to cast upon the party seeking a new trial the burden of showing that any *technical errors* that he may complain of have affected his substantial rights, otherwise they are to be disregarded. . . . The proposed legislation affects only *technical errors*.'") (emphasis added) (internal quotations omitted).

By its terms, the provision declared its twofold purpose: 1) to ensure that appellate courts are reflective and deliberate in deciding questions of prejudicial error *by examin[ing] the entire record*,[15] and 2) to make certain that reversals are based upon errors which might have influenced the proceedings, not upon trivial or *technical* defects. *Kotteakos*, 328 U.S. at 759-62; *see also McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) ("The harmless error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial . . . "); *Bihn v. United States*, 328 U.S. 633, 638 (1946) (interpreting the harmless error statute as preventing criminal appeals from

[15] *Brecht v. Abrahamson*, 507 U.S. 619, 641 (1993) (Stevens, J., concurring) ("Of particular importance, the statutory command requires the reviewing court to evaluate the error in the context of the entire trial record.").

becoming mere "quest[s] for error"); *Bruno v. United States*, 308 U.S. 287, 294 (1939) ("Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict.").

Citing *Yazoo* and *Fillippon*,[16] the High Court in *United States v. River Rouge Improvement Co.*, 269 U.S. 411 (1926) affirmed the survival of the common-law rule in the wake of § 391:

> The present case is not controlled by the provision of section 269 of the Judicial Code, as amended by the Act of February 26, 1919. . . . We need not enter upon a discussion of the divergent views which have been expressed in various Circuit Courts of Appeals as to the effect of the Act of 1919. It suffices to say that *since the passage of this Act, as well as before, an error which relates*, *not to merely formal or technical matters*, but to the substantial rights of the parties – especially when embodied in the charge to a jury – is to be held a ground for reversal, *unless it appears from the whole record that it was*

[16] *See supra* p. 19.

> *harmless and did not prejudice the rights of the complaining party . . .* [17]

Id. at 421 (emphasis added); *see also Williams v. Great S. Lumber Co.*, 277 U.S. 19, 26 (1928) (following *River Rouge*); *but see Berger v. United States*, 295 U.S. 78, 82 (1935) (interpreting § 391 as eliminating the rule of presumed prejudice of an error); *but compare Brown v. Speller, et al.*, 344 U.S. 443, 460 (1953) (habeas proceeding) (observing that "[w]here it is made to *appear affirmatively*, as here, that the alleged error could not affect the result, such error may be disregarded even in the review of criminal trials," *citing Berger, Kotteakos*, and *Bihn* for this proposition. (emphasis added)).

In *McCandless v. United States*, 298 U.S. 342 (1936), a civil suit, the Court followed this interpretation of § 391:

> In this situation, section 269 is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record "without regard to technical errors, defects, or exceptions which do not affect the substantial

[17] By conditioning the application of harmless error upon an affirmative showing of harmlessness or lack of prejudice, the Court implicitly held that the burden of persuasion falls on the respondent. *See Olano*, 507 U.S. at 734 (observing that, by framing the error correction issue under Fed. R. Crim. P. 52(a) in terms of an affirmative showing of lack of prejudice, Congress intended to place the burden of proof on the government/respondent).

> rights of the parties." *This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial . . .*

Id. at 347-48 (emphasis added); *see also Ind. Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.*, 293 U.S. 268, 281 (1934) ("Respondents had opportunity here to show that, although given on untenable grounds, the judgment below is right and should be affirmed. And, if by the record they could so demonstrate, this court, if satisfied beyond doubt that it could do so without prejudice to petitioner, properly might refrain from reversal.").

And later relying upon *McCandless*, the Court in *Bihn* interpreted § 391 as placing on the respondent the risk of doubt as to the prejudicial effect of non-technical, nontrivial errors:

> We certainly cannot say from a review of the whole record that *lack of prejudice affirmatively appears*. While there was sufficient evidence for the jury, the case against petitioner was not open and shut. *Since the scales were quite evenly Balanced* [sic], we feel that the jury might have been influenced by the erroneous charge. Hence we cannot say it was not prejudicial and hence treat it as a *minor aberration of trivial consequence*.

328 U.S. at 638 (emphasis added); *compare O'Neal v. McAninch*, 513 U.S. 432, 439 (1995) ("[I]f a judge is in grave doubt about the effect on the jury of this kind of error, the petitioner [respondent] must loose. . . . By 'grave doubt' we mean that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.").

c) The *Palmer* Decision Is Not Contrary To Controlling Supreme Court Authority Placing The Burden Of Persuasion On The Respondent

One Supreme Court opinion in possible tension with this settled construction of § 391 is *Palmer v. Hoffman*, 318 U.S. 109 (1943). But a close examination shows *Palmer* to be consistent with the controlling line of authority.

In *Palmer,* a witness for the respondent testified during cross-examination that he gave a signed statement to one of respondent's attorneys. *Id.* at 116. Petitioners' counsel asked to review the document, and the trial court ruled that, if counsel inspected the document, the statement would be admitted into evidence. Objecting to the ruling, petitioners' counsel declined to review the document. On review, petitioners failed to include this document in the record on appeal. *Id.*

Rejecting petitioners' appeal on this evidentiary issue, the Court explained:

> Petitioners contend that that ruling was reversible error in light of Rule 26(b) and Rule 34 of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c. We do not reach that question. Since the document was not marked for identification and is not a part of the record, we do not know what its contents are. It is therefore impossible, as stated by the court below, to determine whether the statement contained remarks which might serve to impeach the witness. Accordingly, we cannot say that the ruling was prejudicial even if we assume it was erroneous. Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. 40 Stat. 118, 28 U.S.C. § 391, 28 U.S.C.A. § 391. *He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted*. That burden has not been maintained by petitioners.

Id. (emphasis added).

By any measure, the emphasized language cannot reasonably be read as a holding, imposing upon the appellant the burden of persuasion to establish the prejudice of *nontechnical* errors. To begin with, *Palmer* fails to cite, let alone discuss, the common-law rule or Supreme Court opinions interpreting section 391 in the same light. Thus, if this

one sentence in *Palmer* were to constitute a broad holding applicable to all errors, technical and non-technical alike, *Palmer* would be overruling *sub silentio* a long line of Supreme Court authority. *See generally Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."); *United States v. Sharpe*, 470 U.S. 675, 694 n.6 (1985) (Marshall, J., concurring) ("Legal reasoning hardly consists of finding isolated sentences in wholly different contexts and using them to overrule *sub silentio* prior holdings.").

As the facts make clear, the *ratio decidendi* of *Palmer* is limited to the longstanding proposition that a reviewing court may not consider matters outside of the record. *See Russell v. Southard*, 53 U.S. 139, 159 (1851) ("according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal"). And, as a consequence, if the evidence in question or an offer of proof of the same is not part of the appellate record, a reviewing court cannot evaluate the prejudicial effect of the loss of the would-be evidence. *Compare* Fed. R. Evid. 103, Advisory Committee Notes, 1972 Proposed Rules, Note to Subdivision (d) ("In the nature of things the application of the plain error rule will be more likely with respect to the admission of evidence than to exclusion, since failure to comply with normal requirements of offers of proof is likely to produce a record which simply does not disclose the error.").

Moreover, *Palmer* was decided before the enactment of 28 U.S.C. § 2111, replacing § 391. Among other subtle changes, § 2111 omitted the word "technical". With respect to § 391, the legislative history indicates that the statute was intended to place the burden of proof upon the appellant to establish prejudice of technical errors. H.R. REP. NO. 65-913, at 1 (3d Sess. 1919). By implication, the burden of persuasion for nontechnical errors was to be borne by the respondent. *Brecht*, 507 U.S. at 641 (Stevens, J., concurring) (reiterating that *Kotteakos* "plainly stated that unless an error is merely 'technical,' the burden of sustaining a verdict by demonstrating that the error was harmless rests on the prosecution.").

Thus, as this Court clarified in *O'Neal*, 513 U.S. at 439-40, *Palmer*'s language must be read in the context of the original harmless error statute, which unlike § 2111, spoke of "technical" errors:

> But this pre-*Kotteakos* language, in context, referred to what the preceding sentence in *Palmer* described as "[m]ere 'technical errors.'" 318 U.S., at 116, 63 S.Ct., at 482. *Kotteakos* itself makes clear that "technical errors" may be different. It quotes an excerpt from the House Report accompanying the harmless-error statute (then 28 U.S.C. § 391) that says the statute casts "'upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights.'" *Kotteakos*, 328 U.S., at 760, 66

S.Ct., at 1246 (quoting H.R.Rep. No. 913, 65th Cong., 3d Sess., 1 (1919)).

The Report, however, (as *Kotteakos* immediately points out) goes on to say that if the error is not "technical," if, instead, "'the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, [then] the burden of sustaining a verdict will, notwithstanding this legislation rest upon the one who claims under it.'" H.R.Rep. No. 913, *supra,* at 1.

d) While Decisions Of The Courts Of Appeals Are Divided On The Allocation Of The Burden Of Persuasion, Supreme Court Authority Controls The Interpretation Of The Original Harmless Error Statute

Following *Palmer*, the courts of appeals have split on the issue of who bears the burden of persuasion on harmless error review in civil cases. *Allen v. Minnstar, Inc.*, 97 F.3d 1365, 1374 (10th Cir. 1996) (Lucero, J., concurring) ("Our decision should not be read as holding that an appellant invariably carries a burden to disprove harmlessness. Such a reading needlessly enters the much conflicted body of jurisprudence regarding burdens or presumptions in harmless error analysis in civil cases.") (internal citations omitted). Several courts place the burden of

persuasion on the respondent either explicitly[18] or implicitly;[19] whereas others impose the burden on the appellant. BP at 29-30.

Be that as it may, this Court's formulation of the common-law rule and its interpretation of the original harmless error statute were clear and controlling

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[18] *Lusby v. T.G. & Y. Stores, Inc.,* 796 F.2d 1307, 1312 n.4 (10th Cir. 1986); *Persinger v. Norfolk & W. Ry. Co.*, 920 F.2d 1185, 1189 (4th Cir. 1990); *Obrey v. Johnson,* 400 F.3d 691, 701 (9th Cir. 2005) ("the harmless error standard we apply in civil cases must be consistent with the standard we apply to nonconstitutional errors in criminal cases: 'we must reverse . . . unless it is more probable than not that the error did not materially affect the verdict.' The party benefiting from the error has the burden of persuasion, and 'in cases of equipoise,' we reverse." (internal citations omitted).

[19] Several courts assume that the respondent bears the burden of persuasion, but disagree as to the applicable standard of proof: *i.e.*, "more probable than not" or "highly probable" that the error was harmless. *Taylor v. Va. Union Univ.*, 193 F.3d 219, 235 (4th Cir. 1999); *id*. at 235 n.10 ("the statutory language of § 2111 implies that Congress intended uniform treatment of the harmless error statute in the civil and criminal contexts"); *Jordan v. Medley*, 711 F.2d at 219 n.6 ("the formulation of *Kotteakos* – if not the same application of that formulation – is used by this court and others to determine effect upon 'substantial rights' in civil cases"); *Williams v. United States Elevator Co.*, 920 F.2d 1019, 1023 (D.C. Cir. 1990) ("We are well aware that the circuits are divided on the appropriate standard of review to apply in gauging the effect of an error in a civil case."); *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 925-27 (3rd Cir. 1985) (holding that harmless error analysis in civil cases is the same as that in criminal cases); *Conway v. Chem. Leaman Tank Lines*, 525 F.2d 927, 929 n.3 (5th Cir. 1976) (holding that the *Kotteakos* standard applies to both civil and criminal appeals for harmless error).

at the time of the enactment of § 706 and § 7261(b)(2). It is against this backdrop that Congress wrote both harmless error measures. *United States v. Wells*, 519 U.S. 482, 495 (1997) (even though lower court opinions may be inconsistent with Supreme Court authority on the interpretation of statutory language, in subsequent enactments "Congress expects its statutes to be read in conformity with this Court's precedents"). In the final analysis, Congress is presumed to know and follow controlling precedent. *Albernaz v. U.S.*, 450 U.S. 333, 341 (1981) ("Congress is 'predominantly a lawyer's body,' (citation omitted) and it is appropriate for us 'to assume that our elected representatives . . . know the law'. . . .").

II. THE DUE ACCOUNT CLAUSE OF § 7261(b)(2) AND THE UNIQUE MECHANICS OF THE VCAA NOTICE REGIME REQUIRE THAT THE BURDEN OF PERSUASION FALL ON THE RESPONDENT/AGENCY

Even if Petitioner were correct that the general rule for prejudicial error under §§ 706 and 7261(b)(2) casts the burden of persuasion on appellants/claimants to establish prejudice, the *due account* clause of § 7261(b)(2) and the unprecedented effect of VCAA notice failures would nevertheless compel the burden of persuasion to fall on the respondent/Agency.

Petitioner contends that the *due account* clause of § 7261(b)(2) arguably confers discretion upon the

Veterans Court in deciding the applicability, but not the interpretation, of the prejudicial error rule: *i.e.*, *if*, but not *how*, the rule of prejudicial error operates. BP at 18.

Petitioner is incorrect on two fronts. First, in the unique context of VCAA notice errors, the *due account* clause must be read as requiring (not just conferring discretion upon) the Veterans Court to allocate the burden of persuasion to the Agency. In light of what results from a notice violation – an undeveloped record on appeal[20] – the *due account* clause, indeed judicial review in general, only makes sense if interpreted as compelling the respondent/Agency to bear the burden of persuasion. *See generally Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509-10 (1989) (noting plain language of a provision will not be interpreted literally if it would create an odd result). Namely, an odd result occurs if veterans denied or short-changed VCAA notice are then required to prove the prejudice of this error with an incomplete record caused by the VCAA error itself. *Cf. Agyeman v. I.N.S.*, 296 F.3d 871, 884-85 (9th Cir. 2002) ("We have held that prejudice may be shown where the [Immigration Judge's] inadequate explanation of the hearing procedures and failure to elicit pertinent facts prevented the alien from presenting evidence relevant to their claim.") (internal citation omitted); *Perez-Lastor v. I.N.S.*, 208 F.3d 773, 782 (9th Cir.

[20] *See infra* pp. 41-49.

2000) ("We cannot require Perez-Lastor to produce a record that does not exist" to prove prejudice.) (internal citation omitted).

Second, contrary to Petitioner's position, the *due account* clause speaks to both the applicability and the interpretation of the prejudicial error rule. The open-ended and minimalistic structure of the statute makes this apparent. With an extensive working vocabulary, Congress could have easily written the harmless error provision to conform with Petitioner's more limited construction by inserting the word "applicability" or a similar term or phrase. *Compare* 38 U.S.C. § 7261(a)(1) (The Veterans Court shall "decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning and *applicability* of the terms of an action of the Secretary; . . . ") (emphasis added); 38 U.S.C. § 7261(b)(1) ("take due account of the Secretary's *application* of section 5107(b)") (emphasis added); 38 U.S.C. § 7292(c), (d)(2) (Congress confers Federal Circuit jurisdiction over Veterans Court decisions involving "any interpretation" of a law, but expressly bars review of a "challenge to a law . . . as applied").

For example, Petitioner's argument would stand on firmer ground if § 7261(b)(2) read: the Veterans Court "shall take due account of [the applicability of] the rule of prejudicial error." *See generally Ali v. Federal Bureau of Prisons*, ___ U.S. ___, 128 S.Ct. 831, 840 (2008) ("Had Congress intended to limit § 2680(c)'s reach as petitioner contends, it easily

could have written 'any other law enforcement officer *acting in a customs or excise capacity*.' Instead, it used the unmodified, all-encompassing phrase 'any other law enforcement officer'".). As it is, the unmodified *due account* clause, not limited to a specific purpose (*i.e.*, determining the applicability or interpretation of the prejudicial error rule) has an unrestricted reach.

Apart from the structure of the statute, Congress' longstanding commitment to those who have served in the military informs § 7261(b)(2), *see Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. . . ."); *Boone v. Lightner*, 319 U.S. 561, 575 (1943) ("The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."). The nonadversarial spirit of the VA adjudication system also imbues § 7261(b)(2). *See Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006) ("We recognize harmless error applies in the Social Security context. . . . Fleshing out the standard's contours of application in this unique, nonadversarial area, however, leads us to conclude we must decline the Commissioner's current invitation to employ it here.").

Petitioner disagrees, insisting that the nonadversarial approach at the administrative level is separate and distinct from the adversarial process at the judicial level:

> As this Court has observed, the VA's administrative claims-adjudication process is nonadversarial and is "designed to function throughout with a high degree of informality and solicitude for the claimant." Judicial review in the Veterans Court, however, is quite different: it follows the traditional adversarial model of appellate litigation. The act of filing an appeal to the Veterans Court "is the first step in an adversarial process challenging the Secretary's decision on benefits," separate and distinct from the VA administrative process.
>
> . . . . The rule of prejudicial error is a limit on the exercise of *judicial* authority, and the fact that the challenged decision was reached through a nonadversarial administrative proceeding does not alter the operation of the rule that a party seeking to invoke the remedial powers of a federal court must demonstrate prejudicial error.

BP at 24-25 (internal citations omitted).

Petitioner's argument cannot withstand scrutiny. Admittedly, a claimant loses certain procedural advantages when the claim moves from the administrative to the judicial level. For example, a claim is subject to issue-exhaustion at the judicial but not administrative level. *See Andrews v. Nicholson*, 421 F.3d 1278, 1283 (Fed. Cir. 2005) ("We have previously

held that *Sims*[21] is inapplicable to proceedings before the Veterans Court, because those proceedings are adversarial in nature. However, proceedings before the Board, like those before the Social Security Council, are non-adversarial.") (internal citations omitted).

Despite their differences, the Veterans Court and the Agency make up the same specialized system for adjudicating claims of disabled veterans and their dependents. *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (en banc) (Michael, J., concurring) ("The Board of Veterans' Appeals, of course, is not a trial court and the Court of Veterans Appeals, while surely an appellate court, is an Article I court set in a *sui generis* adjudicative scheme for awarding benefit entitlements to a special class of citizens, those whose risked harm to serve and defend their country. This entire scheme is imbued with the special beneficence from a grateful sovereign.").

The two, therefore, must interact synergistically as one integrated system. *U.S. v. Morgan*, 307 U.S. 183, 191 (1939) ("[I]n construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute");

[21] *Sims v. Apfel*, 530 U.S. 103 (2000).

Fishgold, 328 U.S. at 285 (1946) ("Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.").

This interplay between judicial and administrative function necessarily implicates the Agency's unique adjudicatory mission. In large part, VA proceedings are about record development: *e.g.*, assisting claimants to find and retrieve relevant documents,[22] producing medical examination and opinion evidence on their behalf,[23] and notifying claimants of missing evidence necessary to prove their claims.[24] These paternalistic obligations exist independently from the Agency's successive fact-finding and decision-making role. Therefore, the record must be developed to its optimum *before* the VA can decide the merits of the claim. *See McGee v. Peake*, 511 F.3d 1352, 1357 (Fed. Cir. 2008) ("Taken together, the passage of Veteran's Judicial Review Act §§ 103(a) and 203(a) create a statutory context in which the VA is required to assist the veteran claimant with fully developing a record before making a decision on the veteran's claim. This

[22] 38 U.S.C. § 5103A(b)-(c).

[23] 38 U.S.C. § 5103A(d).

[24] 38 U.S.C. § 5103(a); *see also* 38 C.F.R. § 3.103(c)(2) ("It is the responsibility of the VA employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which may be of advantage to the claimant's position.").

fully developed record then forms the basis of a Board decision."). *Manio v. Derwinski*, 1 Vet. App. 140, 144 (1991) ("'Implicit in such a beneficial system has been an evolution of a completely ex parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits.'") (internal quotation and citations omitted).

In short, the Agency's record-developing duties are seminal to its adjudicatory function, sharply distinguishing its inquisitorial process[25] from the adversarial model of virtually every other adjudicatory system.[26] To ignore altogether these pro-claimant features at the judicial level would be to lose sight of the overall function and purpose of the system. *See Nolen v. Gober*, 222 F.3d 1356, 1361 (Fed. Cir. 2000) (noting that Veterans Court's adjudication of claims must be consistent with uniquely pro-claimant VA system). A comparison of other adjudicatory forums illustrates this point.

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[25] *Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (en banc) (Mayer, J., dissenting) ("Viewed in its entirety, the veterans' system is constructed as the antithesis of an adversarial, formalistic dispute resolving apparatus. It is entirely inquisitorial in the regional offices and at the Board of Veterans' Appeals where facts are developed and reviewed.").

[26] *See Sims*, 530 U.S. at 110-11 (Social Security Disability Benefits System is based upon a nonadversarial and inquisitorial model).

In civil, criminal and most administrative proceedings, appellate review assumes a fully developed record; each party at the trial or administrative level prepares and submits into the record all their respective evidence. *See Greenlaw v. United States*, 128 S.Ct. 2559, 2564 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). Unlike the Secretary in the pro-claimant VA system, adversarial litigants bear no responsibility to advise opponents of evidence necessary for prevailing in the case. *See* 38 U.S.C. § 5103(a).

Consequently, in the typical appellate setting, the standard *Kotteakos* inquiry serves reviewing courts well in resolving the harmless error question: *i.e.*, the extent of the error's prejudice, if any, is measured against a fully developed record on appeal. *See generally Kotteakos*, 328 U.S. at 765; *see also Arizona v. Fulminante*, 499 U.S. 279, 307-08, 310 (1991) (Rehnquist, J., concurring) ("The common thread connecting these cases is that each involved 'trial error' – error which occurred during the presentation of the case to the jury, and which may therefore *be quantitatively assessed in the context of other evidence presented* in order to determine whether its admission was harmless beyond a reasonable doubt. . . . When reviewing the erroneous admission of an involuntary

confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt.") (emphasis added); *Delaware v. Van Arsdall,* 475 U.S. 673, 684 (1986) ("Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts."); *Charter v. Chleborad*, 551 F.2d 246, 249 (8th Cir. 1977) (civil case: "Defendant's final argument against reversal is that any error was harmless and did not affect a substantial right of the plaintiff. To pass on this argument we must view the total circumstances of the case.") (footnote omitted); *Aetna Cas. and Sur. Co. v. Gosdin,* 803 F.2d 1153, 1159 (11th Cir. 1986) ("We must assess whether, in light of the strength of the other evidence, the admission of the prejudicial evidence was harmless.").

On the other hand, the Veterans Court's ability to decide questions of prejudice in connection with § 5103(a) notice violations is severely compromised. In this procedural posture, the Veterans Court reviews a presumptively incomplete record; it can only guess about additional evidence that might have been submitted by the claimant with proper notice. *Washington v. Nicholson*, 21 Vet. App. 191, 195 (2007) ("The Court cannot speculate whether the appellant actually would have submitted such evidence if provided the opportunity . . . ").

For instance, had the Respondent received adequate § 5103(a) notice, "it is possible that [he] would have sought and obtained additional medical opinions, evidence, or treatises [or other relevant documents] to rebut the [VA's] evidence." *Daniels v. Brown*, 9 Vet. App. 348, 353 (1996) (rejecting the Secretary's harmless error argument after determining that the VA violated the notice requirement under *Thurber v. Brown*, 5 Vet. App. 119 (1993)); *Marsh v. West*, 11 Vet. App. 468, 471 (1998) (following the *Daniels* holding). Further still, Respondent might have submitted other probative evidence, medical or otherwise, leading the VA to procure evidence necessary for substantiating his claim. *Pelegrini v. Principi*, 18 Vet. App. 112, 121 (2004) ("Further, it would require pure speculation for the Court to determine at this time that, once given the notice to which he is entitled, the appellant definitely could not provide or lead VA to obtain the information or evidence necessary to substantiate his service-connection claim.").

On this score, Petitioner submits:

> In these cases, for example, Sanders allegedly failed to receive notice of "who would ultimately be responsible for obtaining evidence necessary to substantiate [his] claim" . . . while Simmons allegedly failed to receive notice "of the evidentiary prerequisites for establishing" her claim . . . Those errors might have prejudiced respondents by making it more difficult for them to provide appropriate evidentiary support for their claims. The only way to determine whether

> there was prejudice, however, is to conduct an inquiry into whether, in the absence of the notice error, respondents would have been able to submit additional evidence. *The record before the Veterans Court includes the VA's entire file, and respondents are in a far better position than the VA to know what additional evidence they might have submitted about their own medical condition*.

BP at 35-36 (emphasis added).

Critically, Petitioner fails to explain how Respondent's subjective knowledge of what he might have submitted with proper notice is (or can be made) a part of the record on appeal. At the Veterans Court, a claimant may not fill this evidentiary gap through the submission of extra-record evidence: whether in the form of declarations, offers of proof or less formal written or oral testimonials. The controlling statutes are categorical, and do not provide for an extra-record exception under any circumstances.[27] 38 U.S.C.

[27] *Compare* 38 U.S.C. § 7261(b)(1)(c) ("*In no event* shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to *trial de novo* by the Court.") (emphasis added) *with* 5 U.S.C. § 706(F) (The reviewing court shall set aside agency action, finding or conclusion "unwarranted by the facts to the extent that the facts are subject to *trial de novo* by the reviewing court.") (emphasis added); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (Under § 706(F), "such de novo review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.").

§ 7252(b) ("Review in the Court shall be on the record of proceedings before the Secretary and the Board."); 38 U.S.C. § 7261(b) ("In making the determination under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans Appeals pursuant to section 7252(b). . . . ").[28]

Save for one misguided exception, the statutory bar against considering extra-record evidence has been strictly enforced. *See Mlechick v. Mansfield*, 503 F.3d 1340, 1345-46 (Fed. Cir. 2007) (deciding all issues of prejudice, including those involving VCAA notice errors, the Veterans Court should review the entire administrative record); *Wilhoite v. West*, 11 Vet. App. 251, 252 (1998) (per curiam); *Rogozinski v. Derwinski*, 1 Vet. App. 19, 20 (1990) (holding that although claimant made reference to specific medical records at an administrative hearing, claimant's failure to submit them into the administrative record precluded consideration of these records on judicial review); *but see Washington*, 21 Vet. App. at 195 (noting for harmless error review of a § 5103(a) defect

[28] *See* Vet. App. R. 11(a) ("The Secretary retains the original claims file. The Secretary must transmit to the Clerk two certified copies of the record on appeal . . . "); Vet. App. R. 11(b)(1) ("If, after the record on appeal has been transmitted to the Clerk and before the filing of the appellant's brief . . . , a party believes that an additional material that was *before the Secretary and the Board* is relevant to an issue on appeal, the party may file a motion to supplement the record.") (emphasis added).

"the appellant need not have actually submitted [the missing] evidence to support his pleading of prejudice because the Court cannot consider new evidence in the first instance", but appellant must make an offer of proof in his appellate brief – "a description of the evidence that he would have submitted if VA had notified him.").[29]

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[29] *Washington* overlooks the evidentiary nature of an offer of proof. For appellate purposes, an offer of proof is every bit as evidential as the evidence it describes. One or the other must be made part of the record at the trial or administrative proceedings. *See* 1 Wigmore, *Evidence* § 20a at 864 (Tillers rev. 1983) ("An offer of proof . . . is required because an appellate court needs an adequate basis for determining whether a trial court's error regarding an evidentiary matter is prejudicial or merely harmless. . . . The offer of proof places the excluded evidence on the record so that the appellate court can determine whether the improper exclusion of evidence at trial warrants reversal.") (footnote omitted).

As such, on judicial review, neither the claimant nor the government may allege facts in his/her appellate brief or in any other submission without evidentiary support in the administrative record. *Schley v. Pullman's Palace Car Co.*, 120 U.S. 575, 578 (1887) ("It is only necessary to say that the facts *dehors* the record, which have been improperly introduced into the brief of the counsel for the defendant. . . ."); *United States v. Carlo Bianchi & Co*., 373 U.S. 709, 715 (1963) ("Indeed, in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no de novo proceeding may be held.") (internal citations omitted); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *Warner*

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In the event of a VCAA notice violation, Petitioner nonetheless assumes that Respondent's claims

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Bros. Inc. v. Dae Rim Trading, Inc., 877 F.2d 1120, 1127-28 (2nd Cir. 1989) ("The merest novice in the law knows that '[f]actual statements contained in a party's brief are not a part of the record.' (Citations omitted)."); *Turner v. Burnside*, ___ F.3d ___ (11th Cir. 2008) (Case No. 07-14791) (holding that facts stated in appellate brief but not found in the record are disregarded); *Nelson v. Swing-A-Way Mfg. Co.*, 266 F.2d 184, 190 (8th Cir. 1959) ("In deciding this case we have, of course, not taken into consideration matters included in the defendant's brief which were not before the trial court and are no part of the record on appeal."); *In Re Frank Fehr Brewing Co.*, 268 F.2d 170, 183 (6th Cir. 1959) ("Factual statements contained in a party's brief are not a part of the record. . . ."); *compare Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 345, 350 (1997) (holding that extra-record evidence may be considered for purposes of court review of agency determination of bid protest because "[a]s a practical matter, . . . in most bid protests, the 'administrative record' is something of a fiction, and certainly cannot be viewed as rigidly as if the agency had made an adjudicative decision on a formal record that is then certified for court review.").

The Veterans Court, like any appellate tribunal, is not an appropriate forum for fact-finding. *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000). Thus, if claimants or the Agency were permitted to introduce extra-record evidence, the Veterans Court would be placed in the awkward position of having to make factual determinations in the first instance. In *Murillo v. Brown*, 8 Vet. App. 278, 280 (1995), the Veterans Court explains:

> For the Court to base its review on documents [or other submissions] not included in the Board's calculus at the time it rendered its decision would render the Court a fact finder de novo, exceeding its authority under the statutory scheme which establishes the Court as an appellate body.

(internal citations omitted); *Bonhomme v. Nicholson*, 21 Vet. App. 40, 43-44 (2007) (using similar analysis).

file[30] will invariably contain all potentially relevant evidence from which Respondent can easily identify the *existing* document(s) he would have otherwise submitted. BP at 36. Petitioner, however, overlooks a fundamental dynamic of the VA evidence-development process. Record development entails more than collecting *existing* records: *e.g.*, service medical records, post-service VA medical treatment records, private medical records. *See* 38 U.S.C. § 5103A(c); 38 C.F.R. § 3.159(c). The process also involves the *production* (*i.e.*, creation) of new evidence, medical or otherwise.[31] In many instances, claimants must *produce* their own evidence to substantiate their claims. Therefore, § 5103(a) – the impetus for claimant participation – is critically important. Section 5103(a) acts as a catalyst, prompting claimants to *produce*[32] evidence when the Agency will not.

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[30] The "claims file" refers to a permanent filed compiled by the Agency for the purpose of adjudicating a claimant's VA benefits claim(s). This file contains all written communications, records and documents generated or received by, or sent to, the VA in connection with the claim(s). *Veterans Benefits Manual*, § 16.3.3.2 at 1310; *Bell v. Derwinski*, 2 Vet. App. 611, 612-13 (1992) (holding that VA generated documents are constructively part of the claims file).

[31] *E.g., Sizemore v. Principi*, 18 Vet. App. 264, 274 (2004) (a lay statement prepared by a fellow soldier may corroborate the claimant's allegations of an in-service incurrence or injury).

[32] Petitioner mistakenly assumes that all potential relevant evidence which is not part of the record *exists* and is easily obtainable by the claimant. BP at 35 ("By contrast, if there actually *is* evidence concerning the claimant's medical condition that is not already in the record and would demonstrate that

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Washington, 21 Vet. App. at 197 (Hagel, J., concurring) ("The duty to notify compels that Secretary to apprise claimants like Mr. Washington not only that medical evidence is required to substantiate the claim, but also whether VA will assume responsibility for obtaining such evidence by providing a medical examination or opinion or whether the claimant is ultimately responsible for obtaining that evidence on his own. *See* 38 U.S.C. § 5103(a).").

By further example, to prevail in a claim for service-connected benefits, a claimant usually must establish a nexus between his present disability and in-service incurrence. *Veterans Benefits Manual*, § 3.4 at 93 ("[T]he most common reason VA claims for disability compensation are not successful is the failure to prove a nexus between the current disability and something that occurred during the period of military service"). In most cases, this nexus requirement calls for a medical expert opinion.[33] *See Bloom v. West*, 12 Vet. App. 185, 187 (1999) (holding that the claim failed for lack of medical nexus opinion); *Rucker v. Brown*, 10 Vet. App. 67, 71 (1997) ("Where the determinative issue involves either medical etiology or a medical diagnosis, competent medical evidence is

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benefits could be awarded, the claimant is far more likely to be the one with access to that information.").

[33] 38 C.F.R. § 3.159(a)(1) ("Competent medical evidence means evidence by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions.").

required. . . ."). But, unless provided by the VA, this necessary medical nexus evidence will not be found in the claims file, as it does not yet exist. Or, this evidence exists only in a hypothetical sense at the judicial level: what medical evidence a claimant now says he would have produced and submitted into the record had he been given adequate notice. *See Mayfield I*, 19 Vet. App. at 125 (drawing distinction between actual or *existing* evidence and evidence yet to be *produced*).

Thus, while the government may well be correct that Respondent enjoys a better (but not prescient[34]) position to know what evidence he might have submitted, he is in no position at all to make this hypothetical evidence part of the appellate record. Lacking any way to establish prejudice, Respondent is effectively foreclosed from obtaining meaningful judicial review of § 5103(a) notice violations. *See McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991)

[34] While a claimant arguably has a good idea of what type of evidence he would have *attempted* to produce, he could never know exactly what that would be. Take, for instance, a claimant alleging he would have sought a medical nexus opinion from his treating physician had he been given an adequate § 5103(a) notice. Under this scenario, the claimant would likely know the questions he would have asked the physician and the information upon which the physician would have based his opinion. *See Veterans Benefits Manual*, § 16.1.6, at 1288; *id.* § 16.6.8.1, at 1346-49. But, unless he actually secured a medical opinion, the claimant could only speculate as to the physician's potential findings.

("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction, and given our well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action . . . it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review.") (internal citation omitted); *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) ("[I]t was for the purpose of ensuring that veterans were treated fairly by the government and to see that all veterans entitled to benefits received them and that Congress provided for judicial review through the Veterans' Judicial Review Act ("VJRA") of 1988").

III. NOTICE UNDER 38 U.S.C. § 5103(a) IS A SUBSTANTIAL RIGHT, A VIOLATION OF WHICH GIVES RISE TO PRESUMED PREJUDICE; THE FEDERAL CIRCUIT'S CALCULUS FOR PREJUDICIAL ERROR ALLOWS THE GOVERNMENT TO ESTABLISH HARMLESS ERROR WITHOUT RESORTING TO EXTRA-RECORD EVIDENCE

In his brief, Petitioner contends that a violation of § 5103(a) should not give rise to presumed prejudice, as it does not have "'the natural effect . . . to prejudice a litigant's substantial rights.'" BP at 30 (citing *Kotteakos*, 328 U.S. at 760). Petitioner is incorrect.

As a threshold matter, Petitioner does not dispute that VCAA notice is an important and substantial right. Quoting the Federal Circuit, Petitioner observes:

> [T]he VCAA's notice requirements have a "fundamental role in furthering an interest that goes to the very essence of the nonadversarial, pro-claimant nature of the VA adjudication system," because they help to provide "a claimant a meaningful opportunity to participate effectively in the processing of his or her claim." (Citation omitted).

BP at 22; *id.* (stating that such "observation is correct"); *see also Locklear*, 20 Vet. App. at 414 ("The duty to notify was designed by Congress with one purpose in mind – to facilitate and maximize the collaborative process that is the cornerstone of the VA claims process."); *Washington*, 21 Vet. App. at 197 (Hagel, J., concurring) (discussing the crucial interplay between the duty to notify under § 5103(a) and the duty to assist under § 5103A); 9th Judicial Conference of the United States Court of Appeals for the Veterans Claims (April 24 and 25, 2006), *reprinted* at 21 Vet. App. CLXXXI (Statement of Chief of the Advisory and Veterans Court Staff with VA Compensation and Pension Service: "[The VCAA] has been a very good piece of legislation, it has given us a greater – greater requirements [sic] that has all been good, it's [sic] resulted in us helping veterans better, which is what we are here for. We are required – there are two parts to the VCAA, one is to provide

notice of the evidence necessary to substantiate the claim, we are required to tell the claimant who is going to get that evidence, what evidence that VA will get, what evidence they are required to provide to us, and also to tell them that they need to submit any other evidence they may have pertinent to that particular claim.").

Rather than focus upon the nature or importance of the right to VCAA notice (*e.g.*, technical/substantial or central/peripheral),[35] Petitioner conjures up the *possibility* that the prejudice of a § 5103(a) violation will be cured, most likely by subsequent VA procedures:

> To the contrary, there are several reasons why a notice error *may* result in no prejudice to a VA claimant. The claimant *may* already be aware, through means other than a VCAA notice, of the types of evidence needed to substantiate his or her claim. Or the claimant *may* simply have no additional relevant evidence to submit. More importantly, in contrast to *Kotteakos*, in which review by the court of appeals provided the first opportunity to correct a trial-court error, the informal and non-adversarial process for adjudicating claims for veterans benefits

[35] *See Jordan v. Medley*, 711 F.2d at 219 (prejudicial error issue turns upon, among other things, the centrality of right affected and the balanced nature of the evidence bearing on the right affected); *McCandless*, 298 U.S. at 348 (exclusion of evidence on pivotal issue gives rise to prejudice).

> provides many procedural safeguards that have the *potential* to cure any defect in the initial Section 5103(a) notice. . . . A rule of presumptive prejudice, however, would be difficult for the VA to overcome – even in cases where there is no prejudice – and would therefore lead to unnecessary remands that would delay the resolution of meritorious claims.

BP at 30-31 (emphasis added) (internal citations omitted); *see id*. at 34-35.

Petitioner's tentative assertion, laden with the word *may*, betrays its speculative nature. *Cf.* Black's Law Dictionary 1598 (6th ed. 1990) (the word "'may' is one of speculation and uncertainty."). This very uncertainty counsels against adopting a rule of presumed harmlessness of VCAA notice errors. In fact, Petitioner's reasons for his proposed rule have no support in law or policy.

Specifically, Petitioner claims that 38 U.S.C. § 5104(b) (VA must give statement of reasons of decision and summary of evidence), § 7105(d)(1) (VA must issue a statement of the case, summarizing reason for decision and evidence and law considered) and other statutory and regulatory procedures might cure the prejudice caused by an absent or defective VCAA notice. BP at 33-34.

Petitioner's reliance on these provisions is misplaced. Sections 5104(b) and 7105(d)(1) and their regulatory counterparts were written at a different

time and for a different purpose. They certainly do not perform the work of § 5103(a).[36] That much was made clear in *Mayfield v. Nicholson* ("*Mayfield II*"), 444 F.3d 1328, 1333 (Fed. Cir. 2006):

> The purpose of the [VCAA notice] statute and the corresponding regulation is to require that the VA provide affirmative notification to the claimant prior to the initial decision in the case as to the evidence that is needed and who shall be responsible for providing it. That duty of affirmative notification is not satisfied by various post-decisional communications from which a claimant might have been able to infer what evidence the VA found lacking in the claimant's presentation. The text of section 5103(b) confirms that Congress envisioned a deliberate act of notification directed to meeting the requirements of section 5103, not an assemblage of bits of information

[36] Petitioner's reliance on the statutory duty to assist under § 5103A is likewise misplaced. BP at 32. The purpose of VCAA notice is to ensure that a claimant can effectively participate in the processing of his/her claim. *Mayfield I*, 19 Vet. App. at 120-21. A claimant's active participation is crucial because, in many instances, the duty to assist will not require the VA to secure a medical examination or opinion on behalf of the claimant. *E.g., Wells v. Principi*, 326 F.3d 1381 (Fed. Cir. 2003). In that situation, proper VCAA notice protects the claimant from losing her claim and potential benefits due to an undeveloped medical record, as the notice advises her not only what evidence is needed, but who is obligated to provide it. *Washington*, 21 Vet. App. at 197 (Hagel, J., concurring).

> drawn from multiple communications issued for unrelated purposes.
>
> Documents such as the 1999 notice of decision, the 2000 statement of the case, and the 2002 supplemental statement of the case that were sent to [claimant] were required by 38 U.S.C. §§ 5104 and 7105 to advise the claimant of the decision rendered on the claim and to facilitate review of that decision. The VA's obligation to provide those communications to the claimant long predated the VCAA. Unlike sections 5104 and 7105, the post-2000 version of section 5103 requires the VCAA notification to be issued prior to the initial decision on the claim, not afterwards. Moreover, the VCAA notification is required to have different contents from the post-decisional notices, and it is designed for different purposes – to ensure that the claimant's case is present to the initial decisionmaker with whatever support is available, and to ensure that the claimant understands what evidence will be obtained by the VA and what evidence must be provided by the claimant.

(internal citations omitted); *see also Quartuccio v. Principi*, 16 Vet. App. 183, 187 (2002) (discussing the Secretary's duty to notify and holding that "a letter from the VA to the appellant, describ[ing] evidence potentially helpful to the appellant but . . . not mention[ing] who is responsible for obtaining such evidence" did not meet VCAA standards).

And even if, as Petitioner suggests, other VA procedures may render VCAA notice violations less prejudicial, the Federal Circuit's calculus for harmless error allows the Agency to make the requisite showing of harmlessness:

> [T]he VA must persuade the reviewing court that the purpose of the notice was not frustrated, *e.g.*, by demonstrating: (1) that any defect was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice what was needed, or (3) that a benefit could not have been awarded as a matter of law.

App. at 14a-15a.

Significantly, the Federal Circuit's test for harmless error has the virtue of deciding all questions on the administrative record: no after-the-fact proffers, testimonials or other extra-record evidence may be introduced or considered. *See supra* pp. 43-44; *id.* pp. 44-46 n.29. Thus, the Federal Circuit's rule of presumed prejudice respects one of the most fundamental tenets of appellate jurisprudence: a reviewing court may only consider evidence of record.

And, contrary to Petitioner's bleak prediction, the Federal Circuit's rule of presumed prejudice would not make it unduly or unfairly difficult for the Agency to overcome the presumption. BP at 35-36. In fact, two published Veterans Court cases invoking the Federal Court's analysis demonstrate that the VA can

successfully rebut the presumption of prejudice in many appropriate circumstances. *E.g., George-Harvey v. Nicholson*, 21 Vet. App. 334, 339-40 (2007) (holding that the deficient VCAA notice was cured because the Agency established the claimant's actual knowledge of what he needed to submit); *Palor v. Nicholson*, 21 Vet. App. 325, 332-33 (2007) (holding that the claimant was not prejudiced by the notice error because the claimant could not be awarded benefits as a matter of law); *see also* pre-*Sanders*, *Dalton v. Nicholson*, 21 Vet. App. 23, 30 (2007) (holding that the claimant was not prejudiced by deficient VCAA notice because the Agency established that the claimant's counsel had actual knowledge of what information and evidence needed to be submitted); *Overton v. Nicholson*, 20 Vet. App. 427, 440-41 (2006); *Medrano v. Nicholson*, 21 Vet. App. 165, 172-73 (2007).

CONCLUSION

The judgment of the Federal Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

1. 28 U.S.C. § 391 (1919) provided:

All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons which new trials have usually been granted in courts of law. On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

2. 38 U.S.C. § 7252 provides, in pertinent part:

Jurisdiction; finality of decisions

(b) Review in the Court shall be on the record of proceedings before the Secretary and the Board. The extent of the review shall be limited to the scope provided in section 7261 of this title [38 USCS § 7261]. The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title [38 USCS § 1155] or any action of the Secretary in adopting or revising that schedule.